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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 429

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, *Petitioner*,

v.

NORTHWEST AIRLINES, INC., *Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Air Line Stewards and Stewardesses Association, International, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on May 29, 1959 (R. 226).

## OPINIONS BELOW

The opinion of the court below (R. 209-222) is reported at 267 F. 2d 170. The opinion of the district court (R. 191-200) is reported at 162 F. Supp. 684.

## JURISDICTION

The judgment of the court below was entered on May 29, 1959 (R. 226). A petition for rehearing duly filed by the petitioner (R. 227-236) was denied on June 26, 1959 (R. 240). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether the Railway Labor Act (45 U.S.C. 151, *et seq.*), as amended by the Air Carrier Amendment (49 Stat. 1189) to "cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every * * * person who performs any work as an employee * * * of such carrier", is limited to "transportation" which "takes place within the United States" because the original Railway Labor Act was applicable only to carriers and employees subject to the Interstate Commerce Act (49 U.S.C. 1, *et seq.*) which in turn applied "only insofar as * * * transportation * * * takes place within the United States."

2. Whether foreign nationals hired outside the United States to perform all of their duties on board an airplane having the nationality of the United States are by reason of the doctrine of the law of the flag subject to the same laws of the United States governing employment relationships as apply to the other members of the same crew who are citizens of the United States, including the Railway Labor Act and the Civil Aeronautics Act of 1938 (49 U.S.C. 401, *et seq.*).

3. Whether a judgment of a federal district court which enforces an arbitration award which requires

one job on each crew outside of the United States to be assigned to an American citizen and deprives foreign nationals on such crews of the benefits of wage rates, hours of employment, seniority and representation by the union, granted to American citizens, thereby discriminates between affected employees solely on the basis of their color, race, citizenship or national origin in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

## STATUTES AND TREATIES INVOLVED

The pertinent provisions of the Air Carrier Amendment to the Railway Labor Act (49 Stat. 1189, 45 U.S.C. 181 *et seq.*), of the Railway Labor Act, as amended (44 Stat. 577, as amended, 48 Stat. 926, 45 U.S.C. 151, *et seq.*), of the Interstate Commerce Act (49 U.S.C. 1, *et seq.*), of the Civil Aeronautics Act of 1938 (52 Stat. 977, 49 U.S.C. 401, *et seq.*), of the Federal Aviation Act of 1958 (72 Stat. 737, 49 U.S.C. 1301 *et seq.*) and of the Chicago Convention on International Civil Aviation of 1944 (61 Stat. 1185) are set forth in Appendix A, *infra*, pp. 1a-9a.

## STATEMENT OF THE CASE

The Northwest Airlines, Inc., is a Minnesota corporation which, as a common carrier by air, is engaged in interstate and foreign commerce and transports mail for and is under contract with the United States Government (R. 2, 33, 57, 67, 68). Northwest Airlines engages in both domestic and foreign operations, all of which are conducted under certificates of public convenience and necessity issued by the Civil Aeronautics Board, with the approval of the President, pursuant to the terms of Title IV, Section 401,

of the Civil Aeronautics Act of 1938 (49 U.S.C. 481), which insofar as here material was reenacted without change in the Federal Aviation Act of 1958 (49 U.S.C. 1371). So far as the instant case is concerned the certificates of public convenience and necessity which are relevant are those of February 8, 1955 and May 3, 1957 (R. 113-120). These certificates authorize Northwest Airlines to engage in transportation between points in the United States and points in Japan, Korea, Okinawa, Taiwan, Hong Kong and the Philippines (R. 114, 118). These certificates make compliance with the Railway Labor Act a condition upon the holding of the certificate in that they expressly provide that observance of the provisions of Title IV of the Civil Aeronautics Act is a condition of the certificate (R. 114, 118) and one of the provisions of this title (49 U.S.C. 481 (1) (4)) is that compliance with the Air Carrier Amendment to the Railway Labor Act shall be a condition to the holding of a certificate.

Prior to the time that Northwest Airlines began its foreign operations the Air Line Stewards and Stewardesses Association had been certified by the National Mediation Board to represent stewardesses employed by Northwest Airlines (R. 121). When it began its overseas operations, Northwest Airlines hired a new category of persons for use solely in these operations, called pursers. The Association petitioned the National Mediation Board to be certified as the representative of these pursers. The National Mediation Board granted this request by a decision in Case No. R-2079, issued October 22, 1948 (R. 122-123). In that decision the National Mediation Board recited (R. 122-123):

> "On December 17, 1946, in Case R-1747, involving employees of this same carrier, the Board certified

that the Air Line Stewards and Stewardesses Association, International, was duly designated and authorized to represent Stewardesses. Since that date, the carrier has begun overseas operations to the Orient. The work performed by Flight Stewardesses on domestic flights is similar to the work performed by Flight Pursers on the overseas operations. * * *

"On the basis of the certification in Case R-1747, together with the Mediator's investigation and the foregoing check of representation authorization, the National Mediation Board hereby amends its certification in R-1747 by finding that the Air Line Stewards and Stewardesses, International, has been duly designated and authorized to represent the craft or class of Flight Pursers and Stewardesses employed by the Northwest Airlines, Inc., for the purposes of the Railway Labor Act."

This certificate in turn was amended to add the group called "flight service attendants" (R. 125). The latest certification of the Association is that issued July 30, 1957, after an election in which another labor organization sought to represent these employees. This certification reads (R. 127):

"the National Mediation Board certifies that the Air Line Stewards & Stewardesses Association, International, have been duly designated and authorized to continue to represent for the purposes of the Railway Labor Act, the craft or class of Airline Flight Pursers, Flight Service Attendants and Stewardesses, employees of the Northwest Airlines, Inc., its successors and assigns."

Acting under these certifications the Association from time to time entered into collective bargaining agreements governing wages, rates of pay, hours, seniority and other terms and conditions of employ-

ment for the craft or class of flight pursers, flight service attendants and stewardesses employed by the Northwest Airlines. These agreements by their terms have always been applicable to and in practice have been applied to all American citizens employed within the craft or class no matter where they were assigned or performed their duties. When the Northwest Airlines began to employ foreign nationals as pursers, stewardesses and flight attendants, the Association and Northwest Airlines became involved in a dispute over the terms and conditions of employment which should be applicable to foreign nationals (R. 46-49). This issue was submitted to an "arbitration board" established under Section 7 of the Railway Labor Act, as amended (45 U.S.C. 157).

On October 21, 1957, the majority of the arbitration board handed down its decision and award, directing that the parties include in their collective bargaining agreement express provisions that "foreign national employees" shall not "be covered by nor subject to any provisions of this agreement" but that "one employee covered by this agreement", i.e., an American citizen, shall be assigned to "all passenger flights operating over all international routes south and west of Japan" (R. 16-18).

On October 22, 1957, the arbitration board filed its decision, and award, together with the record of the arbitration proceedings, including the transcript of testimony and exhibits received at the hearings, in the office of the clerk for the United States District Court, District of Minnesota, Third Division (R. 205), all as provided in Section 9 of the Railway Labor Act, as amended (45 U.S.C. 159, First).

On October 29, 1957, the Association filed in said district court its "Petition under Railway Labor Act to Impeach Arbitration Award" (R. 1-9, 205) on the ground that the award did not conform to the substantive requirements of the Railway Labor Act, as amended, such failure to conform being one of the grounds specified in Section 9, Third (a) of that Act (45 U.S.C. 159, Third (a)) for impeaching an award. The petition alleged that the award deprived the majority of the class or craft, as well as the Association, of the rights granted them by Section 2, Fourth, Sixth, Seventh and Ninth of the Railway Labor Act (45 U.S.C. 152, Fourth, Sixth, Seventh and Ninth) to bargain collectively on behalf of all members of the craft or class and to protect their wages, hours, seniority and other conditions of employment from undercutting by the employment of persons within the same craft or class to perform the same class of work at lower wages, longer hours or without seniority or other beneficial employment conditions (R. 6-9). The petition further alleged that the award similarly deprived foreign nationals hired by Northwest Airlines of their rights under the Railway Labor Act and under the due process clause of the Fifth Amendment to the Constitution of the United States to be represented fairly and nondiscriminatorily by the Association and to enjoy the same collectively bargained rates of pay, hours, seniority and conditions of employment applicable to all other members of the craft or class without discrimination because of race, color, citizen ship or national origin (R. 7).

The petition alleged that the federal district court would violate the due process clause of the Fifth Amendment to the Constitution of the United States if

it were to enter a judicial decree confirming an award which imposes discrimination because of race, color, citizenship or national origin in matters of representation, wages, hours, seniority and conditions of employment (R. 8).

The petition accordingly prayed that the district court impeach the said award in the manner specified in Section 9 of the Railway Labor Act, as amended (45 U.S.C. 159), and enter final judgment setting aside the award and granting the Association such other and further relief as to the court should seem just (R. 9).

The Northwest Airlines duly filed its answer (R. 32-36) admitting most of the facts set forth in the petition (R. 32-34), but taking issue with the Association's construction of the certifications of the National Mediation Board as authorizing the Association to represent foreign nationals not domiciled in the United States (R. 33). In its answer Northwest Airlines contended that if the certifications did include such foreign nationals, that the certifications were void as "in excess of the jurisdiction of the National Mediation Board and of the United States Government, and in derogation of the terms and provisions of the Railway Labor Act, as amended" (R. 33-34).

Since the answer did not raise any substantial issue of fact, the Association filed a motion for summary judgment (R. 56-61).

On June 10, 1958, the district court entered a memorandum order denying the motion for summary judgment (R. 191-200) on the ground that the Railway Labor Act is limited to transportation which takes place within the United States (R. 197-200). The district court rejected the doctrine of the law of the flag

as inapplicable to aircraft (R. 198-200). It held the constitutional claim was without merit because "Respondent's foreign national employees are not residents of this country or its territories entitled to the benefit and protection of the Constitution" (R. 196, n. 6).

The court agreed with the Association that if the Railway Labor Act were applicable the award should be set aside. In this respect the district court ruled (R. 196-197):

> "If, as petitioner contends, the Act applies to such flights, those portions of the award which permit respondent to bargain independently with foreign nationals employed by it as cabin attendants (hence within the craft or class which petitioner has been certificated to represent) would violate Section 2, Fourth of the Act, and the entire award would, by statutory command, be set aside."

The district court on June 29, 1958 entered its final judgment enforcing said arbitration award (R. 202-203).

On appeal to the United States Court of Appeals for the Eighth Circuit, the judgment below was affirmed (R. 209-226). The court of appeals agreed that the Railway Labor Act, as applied to air carriers, is confined to transportation which take place within the United States (R. 212-218). It reached this result on the ground that the original Railway Labor Act was applicable only to carriers and employees subject to the Interstate Commerce Act, which in turn applied "only insofar as * * * transportation * * * takes place within the United States" (R. 212-213).

With respect to the law of the flag, the court of appeals held that Congress has the "power to make the

Railway Labor Act applicable to employees employed on American flag airplanes and who work wholly outside the United States" (R. 218) but should not be presumed to have done so in the absence of a specific statutory direction to that effect (R. 211).

With respect to the claim of unconstitutionality, the court of appeals stated that it was unnecessary to discuss "the constitutionality of an award if such award should have excluded foreign nationals on the basis that they were such. That is not our situation" (R. 217).

## REASONS FOR GRANTING THE WRIT

1. This case presents three important questions which should be settled by this court. All three questions represent different legal aspects of the same broad general problem: what law governs employment relationships on board American flag airplanes when flying beyond the physical boundaries of the United States. Whether the Railway Labor Act by its terms is applicable, presents a question of statutory construction. Whether American law governs both American citizens and foreign nationals performing services wholly on board American flag airplanes, presents a question of international law. Whether the due process clause of the Fifth Amendment to the Constitution of the United States operates with respect to a judicial decree of a federal court enforcing in express terms discrimination against "foreign nationals" employed on board American flag airplanes, presents a question of constitutional law.

All three questions are of great public importance. American air commerce abroad has already achieved sizeable proportions. In each the years 1957 and 1958

more than four million revenue passengers were carried by scheduled American flag airplanes in international operations.[1] This represents a doubling of international travel on American flag carriers by air since 1951.[2] A continued rapid increase can be reasonably anticipated.

The decision below upsets well established bargaining patterns in the industry. For fifteen years the Air Line Pilots Association which represents practically all pilots employed by American air carriers, has maintained collective bargaining agreements applicable to all pilots on American flag ships including those who fly wholly outside the United States or its territories (R. 129-132). The Flight Engineers International Association, which represents approximately 85 percent of the flight engineers in the United States, likewise maintains collective bargaining for flight engineers on a world wide basis (R. 175-177). In actual practice the Railway Labor Act is now and always has been applied by air carriers and associations representing pilots and engineers to cover pilots and engineers who are based or fly wholly outside the continental or territorial limits of the United States (R. 130-132, 175-177).

Similarly, the practice of the National Mediation Board of applying the Railway Labor Act to transportation outside the United States is illustrated by the action of the National Mediation Board in the instant case. When Northwest Airlines began its international operations, the National Mediation Board took

[1] U. S. Department of Commerce, CAA, Statistical Handbook of Civil Aviation, U. S. Gov't Print. Off., 1958 ed., pp. 60, 86.

[2] *Idem.*, p. 86.

jurisdiction and certified the Association as the representative of the overseas pursers (R. 122-123). This certification is completely nullified by the decision below.

The certificates of public convenience and necessity issued by the Civil Aeronautics Board to Northwest Airlines to authorize it to engage in overseas and foreign air transportation expressly provide that the authorization is subject to the provisions of Title IV of the Civil Aeronautics Act of 1938 (R. 114, 118). One of the provisions of Title IV of the Civil Aeronautics Act of 1938 (49 U.S.C. 481 (l) (4)), which was reenacted without change in the Federal Aviation Act of 1958 (49 U.S.C. 1371 (k) (4)), is that it shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with the Air Carrier Amendment to the Railway Labor Act (45 U.S.C. 181-188). The legislative history of this provision shows that the main reason for its enactment was to provide a sanction which would insure obedience to the Railway Labor Act by American companies operating to and through foreign countries.[3] This Congressional objective, as well as the inclusion of this condition in the certificates of Northwest Airlines here involved, is completely nullified by the decision below.

[3] Hearings, Senate Subcommittee on Interstate and Foreign Commerce, on S. 2, 75th Cong., 1st Sess., p. 585; Hearings, House Committee on Interstate and Foreign Commerce, on H.R. 5234, 75th Cong., 1st Sess., p. 213; Hearings, House Committee on Interstate and Foreign Commerce, on H.R. 9738, 75th Cong., 2d Sess., p. 237; Hearings, Senate Subcommittee of Committee on Interstate and Foreign Commerce, on S. 3659, 75th Cong., 3rd Sess. pp. 18, 64-65; Hearings, Senate Committee on Interstate and Foreign Commerce, on S. 3845, 75th Cong., 3rd Sess., p. 295.

2. We believe that the court below improperly applied the principles of law developed by this Court, when the court below held that under the decision in *Foley Bros. v. Filardo*, 336 U.S. 281, it was required to construe the Railway Labor Act as applied to carriers by air to be limited to their domestic, to the exclusion of their international, operations (R. 221-222). Here the express coverage of "foreign commerce" of air carriers negatives any Congressional intent to give the statute a purely local application.

The court below, in its reading of the Air Carrier Amendment, fell into an error by using the United States Code Annotated instead of the original enacting statute. The court below quotes the coverage section of the Air Carrier Amendment (Section 201) as set forth in Section 181, Title 45 of the United States Code Annotated, as providing that "all the provisions of sections 151" (R. 212), namely, the definition section of the original Railway Labor Act, shall apply to carriers by air. Congress actually did not make any such reference in the coverage section of the Air Carrier Amendment (Section 201, 49 Stat. 1189) to the definition section of the original Railway Labor Act (Section 1, 45 U.S.C.A. 151). In order to avoid the misleading effect of the form codification used, we here quote the relevant portions of the Act of Congress adopting the Air Carrier Amendment (49 Stat. 1189):

> "the Railway Labor Act, approved May 20, 1926, as amended, herein referred to as 'Title I,' is hereby further amended by inserting after the enacting clause 'Title I' and adding the following Title II:
>
> "'Title II
>
> "'Section 201. All of the provisions of title I of this Act, except the provisions of section 3, there-

of are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

"'Section 202. The duties, requirements, penalties, benefits and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee', respectively in section 1 thereof.'"

Congress thus said in plain unequivocal language that the Railway Labor Act was to apply to every carrier by air engaged in foreign transportation and every employee of such carrier. It defined the group to which the Railway Labor Act was to be extended. It expressly excluded applying the definitions of "carrier" and "employee" as set forth in the Railway Labor Act to air carriers and their employees for it stated the new group was to be included "as though" they "were specifically included within the definitions of 'carrier' and 'employee'" of the original statute. The court below nevertheless held that air carriers and their employees must be strained through the definitions of carrier and employee in the original Act (R. 212-213). Only by straining air carriers and their employees through the definitions of the original Railway Labor Act is it possible to reach the limitation of the Interstate Commerce Act, that only "transportation

* * * within the United States" is covered. But any attempt to strain air carrier and their employees through the definitions of Section 1 of the Railway Labor Act does not lead to the result that only transportation in the United States is covered. Rather it would result in excluding all carriers by air and all employees of all carriers by air from the Railway Labor Act. Section 1, First of the Railway Labor Act provides:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act. * * *"

Since no carrier by air is subject to the Interstate Commerce Act, no carrier by air would be covered by the Railway Labor Act.

Section 1, Fifth of the Railway Labor Act provides:

> "The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such orders; * * *"

Since no employee or subordinate official of any carrier by air performs any work defined as that of an employee or subordinate official in any orders of the Interstate Commerce Commission now in effect, or which has ever been in effect, and since the Interstate Commerce Commission has no power to make any

orders with respect to employees of carriers by air, no employee of any carrier by air would be covered by the Railway Labor Act.

When Congress went out of its way in the Air Carrier Amendment to specify that it wanted to add to the group already covered by the Railway Labor Act, the additional group composed of air carriers engaged in "foreign commerce", a phrase not present in the original Railway Labor Act, Congress by the use of the term "foreign commerce" indicated that it envisioned extending the benefits of that Act to a world-wide air fleet which knew no national boundaries. To attempt to carve out, and apply the Railway Labor Act only to, a territorial segment of that world wide air operation is anachronistic. It is also out of harmony with the long line of decisions by this Court and lower federal courts holding that the Sherman Act, the Lanham Trade Mark Act and the Fair Labor Standards Act apply to business operations of American companies conducted outside the physical boundaries of the United States. *Steele* v. *Bulova Watch Co., Inc.*, 344 U.S. 280, 282, 285-286; *United States* v. *Timken Roller Bearing Co.*, 341 U.S. 593, 599, modifying 83 F. Supp. 284; *Holophone Co., Inc.* v. *United States*, 352 U.S. 903, affirming 119 F. Supp. 114; *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 389-390; *United States* v. *Aluminum Co. of Am.*, 2 Cir., 1945, 148 F. 2d 416; *Ramirez & Feraud Chili Co.* v. *Las Palmas Food Co.*, S. D. Calif., 1956, 146 F. Supp. 594, affirmed 9 Cir., 235 F. 2d 874; *United States* v. *R. P. Oldham Co.*, N. D. Calif. S. D. 1957, 152 F. Supp. 818, 821-822; *United States* v. *Imperial Chemical Industries*, S.D.N.Y. 1951, 100 F. Supp. 504, 592, supplemented, 105 F. Supp. 215; *United States* v. *National Lead Co.*, S.D. N.Y. 1945, 63 F. Supp. 513, 514;

*United States* v. *General Electric Co.*, S.D. N.Y., 1949, 82 F. Supp. 753, 842, 847.

3. In relying upon the cases of *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100 and *Scharrenberg* v. *Dollar S. S. Co.*, 245 U.S. 122 (R. 218-221), the court below ignored more recent decisions by this Court which enunciate a rule different from that which the court below found in those cases. In *Romero* v. *International Term. Co.*, 358 U.S. 354, 382; *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 143, n. 5; *Lauritzen* v. *Larsen*, 345 U.S. 571, 584-585, this Court held that Congressional enactments, in fields where the law of the flag governs, were to be applied not according to physical boundaries but according to international concepts of jurisdiction. This Court expressly rejected the necessity for a specific Congressional direction that a statute be so applied. In *Romero* this Court pointed out that the "principles on which" *Lauritzen* "was decided did not derive from the terms of that statute" (358 U.S. at 382).

It is now settled international law that airplanes are subject to the same law of the flag as ships at sea. Continuously since the first recorded discussion we have been able to locate of the law to be applied to international civil aviation, which occurred in 1901[4] and up to and including the recent discussions of law applicable to space ships,[5] there has been almost universal

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[4] See review of the development of the law of the flag as applicable to airplanes set forth in John C. Cooper, National Status of Aircraft, 17 J. Air Law 292 (Summer 1950).

[5] See Rear Admiral Chester Ward, U.S.N., Projecting the Law of the Sea into the Law of Space, J.A.G. Journal, March 1957, p. 3, an address before the 11th Annual Meeting of the American Rocket Society in New York City, November 27, 1956.

consensus of opinion that the law of the flag as developed with respect to seagoing vessels should be applied to all forms of transportation moving through the air or space."

At the time Congress enacted the Air Carrier Amendment to the Railway Labor Act in 1936, our nation was already a party to treaties establishing the law of the flag as the governing principle in respect to allocation of jurisdiction over airplanes engaged in international transport. See for instance the Pan American Convention on Commercial Aviation signed at Havana on February 20, 1928 (47 Stat. 1903).

While none of the nations, except the United States, whose territory is flown over or landed upon, by the flights of Northwest Airlines, was a party to the Pan American Convention, all of these nations are parties to the Chicago Convention on International Civil Aviation of 1944 (61 Stat. 1180, 4 U.S.T. 1949) which similarly provided for the law of the flag as the basic principle for governing conduct aboard an airplane in international operations. See H.P. Honig, The Legal Status of Aircraft, The Hague, Martinus Nijhoff, 1956, p. 191.

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"This includes applying the law of the flag to the aircraft when it is standing on foreign territory during a landing, as well as when it is flying over that territory, so long as only the internal economy of the aircraft is concerned. Compare Draft Convention on Jurisdiction with respect to Crimes, prepared as part of the Codification of International Law by the Advisory Committee on the Research in International Law under the auspices of Harvard Law School, Supplemental 1935, 29 Am. Journal of International Law, pp. 435; International Law Association, Report of the 33rd Conference, Stockholm, 1924, London, Sweet & Maxwell, 1925, pp. 117-118.

The law of the flag as developed with respect to seagoing vessels and its applicability to labor relations between crew and ship owner have been fully set forth in recent decisions by the court. *Romero* v. *International Term. Co.*, 358 U. S. 354, 382-384; *Lauritzen* v. *Larsen*, 345 U.S. 571, 584-585; *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 143, n. 5. The American cases uniformly hold that the law of the flag governs wages, hours and terms of employment. *The Belgenland*, 114 U.S. 365, 367; *The Hanna Nielsen*, 2 Cir. 1921, 273 Fed. 171, 172; *McQuade* v. *Compania de Vapores San Antonio, S.A.*, S.D. N.Y. 1955, 131 F. Supp. 365, 366-367; *Grivas* v. *Alianza Compania Armadora*, S.D. N.Y. 1957, 150 F. Supp. 708, 711-712; *Rodriguez* v. *Geroutas Compania de Navegacion*, S.D. N.Y. 1957, 150 F. Supp. 715, 718, 720-722; *Evangelinos* v. *Andreavapor Cia. Nav. S. A.*, S.D. N.Y., 1958, 162 F. Supp. 520, 521-522 The foreign seaman is "entitled to the protection and benefits of all the laws passed by Congress on behalf of American seamen" *In re Ross*, 140 U.S. 452, 472. Cf. *The Blakeley*, D.C. W.D. Wash. N.D., 1916, 234 Fed. 959, 961; *Taylor* v. *Atlantic Maritime Co.*, 2 Cir., 1950, 179 F. 2d 597; *Carroll* v. *United States*, 2 Cir., 1943, 133 F. 2d 690.

The National Labor Relations Board has applied the National Labor Relations Act to all members of crews of American owned ships of American registry. It has voted all members of the crew, including aliens, by mail ballots conducted even in distant ports. *E.g. Cities Service Oil Co.*, 87 N.L.R.B. 324, 331.

4. The court below disposed of the constitutional issue on the ground that the award did not discriminate against "foreign nationals on the basis that they

were such" (R. 217). However, the award does use the term "foreign national" to define those excluded (R. 17). The award makes the collective bargaining agreement applicable to all who are not "foreign national" (R. 16-17). We do not understand how the court could state that the award enforced by the district court did not exclude foreign nationals solely on the basis they were such.

The district court disposed of the constitutional issue by holding that the constitution did not protect foreign nationals who are not residents of the United States or its territories (R. 196, n. 6). This holding is contrary to recent holdings of this and other courts that the protections of the constitution extend to aliens outside the United States. *In re Yamashita*, 327 U.S. 1, 9; *Ex Parte Quirin*, 317 U.S. 1, 24-25; *Turney* v. *United States*, 126, Ct. Cl. 202, 115 F. Supp. 464, cited with approval in *Reid* v. *Covert*, 354 U.S. 1, 8, n. 10. Cf. *Seery* v. *United States*, Ct. Cl. 1955, 127 F. Supp. 601, 603; *Miller* v. *United States*, Ct. Cl., 1956, 140 F. Supp. 789, 791.

The judgment of the federal district court enforcing the award, adopts the discrimination therein as an act of the federal judiciary and hence violates the federal due process clause. Cf. *Barrows* v. *Jackson*, 345 U.S. 249; *Shelley* v. *Kramer*, 334 U.S. 1; *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 198; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768; *Conley* v. *Gibson*, 355 U.S. 41; *Truax* v. *Raich*, 239 U.S. 33; *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 40; *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 525; *Oyama* v. *California*, 332 U.S. 633.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated September 24, 1959

# APPENDIX

# APPENDIX A

## 1.

### The Air Carrier Amendment to the Railway Labor Act

The relevant provisions of the Air Carrier Amendment (49 Stat. 1189, 45 U.S.C. 181, *et seq.*), to the Railway Labor Act, are as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That the Railway Labor Act, approved May 20, 1926, as amended, herein referred to as 'Title I', is hereby further amended by inserting after the enacting clause 'Title I' and by adding the following title II:

"'Title II

"'Section 201. All of the provisions of title I of this Act, except the provisions of section 3, thereof are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

"'Section 202. The duties, requirements, penalties, benefits and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 1 thereof.'"

## 2.

### The Railway Labor Act, as amended

The relevant provisions of the Railway Labor Act, as amended (44 Stat. 577; 48 Stat. 926, 45 U.S.C. 151, *et seq.*) are as follows:

"Title I

"Definitions

"Section 1. When used in this Act and for the purposes of this Act

"First. The term 'carrier' includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act. * * *

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its controlling authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders. * * *

"Section 2. * * *

"General Duties

"Fourth. * * * The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this Act. * * *

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: * * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its

employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute; and certify the same to the carriers. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.

"Arbitration

"Section 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the foregoing sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three . . .

"Section 9. First. The award of a board of arbitration, . . . shall be filed in the clerk's office of the district court . . .

"Second. An award acknowledged and filed as herein provided shall be conclusive on the parties . . . unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed . . .

"Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

"(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, * * *

* * * * *

"Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: * * *".

3.

INTERSTATE COMMERCE ACT, AS AMENDED

The relevant provisions of the Interstate Commerce Act, as amended (24 Stat. 379, 49 U.S.C. 1, *et seq.*) are as follows:

"Section 1. (1) The provisions of this Act shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

"(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by railroad or by water—

"From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes places within the United States.

"(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States. * * *"

## 4.

### The Civil Aeronautics Act of 1938

The relevant provisions of the Civil Aeronautics Act of 1938 (52 Stat. 977, 49 U.S.C. 401, *et seq.*) are as follows:

"Title IV

"Air Carrier Economic Regulation

"Certificate of Public Convenience and Necessity

"Certificate Required

"Section 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: * * *

* * * * * * *

"Terms, Conditions and Limitations

"(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. * * *

* * * * * * *

"Compliance With Labor Legislation

"(*l*) (1) Every air carrier shall maintain rates of compensation, maximum hours, and other working conditions and relations of all of its pilots and copilots who are engaged in interstate air transportation within the continental United States (not including Alaska) so as to conform with decision numbered 83 made by the National Labor Board on May 10, 1934, notwithstanding any limitation therein as to the period of its effectiveness.

"(2) Every air carrier shall maintain rates of compensation for all of its pilots and copilots who are engaged in overseas or foreign air transportation or air transportation wholly within a Territory or possession of the United States, the minimum of which shall be not less, upon an annual basis, than the compensation required to be paid under said decision 83 for comparable service to pilots and copilots engaged in interstate air transportation within the continental United States (not including Alaska).

"(3) Nothing herein contained shall be construed as restricting the right of any such pilots or copilots, or other employees, of any such air carrier to obtain by collective bargaining higher rates of compensation or more favorable working conditions or relations.

"(4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

* * * * *

"Title V

"Nationality and Ownership of Aircraft

"Registration of Aircraft Nationality

"Section 501. (a) It shall be unlawful for any person to operate or navigate any aircraft eligible for registration if such aircraft is not registered by its owner as provided in this section, or (except as provided in section 1107 of this Act) to operate or navigate within the United States any aircraft not eligible for registration: * * *

* * * * *

"(c) Upon request of the owner of any aircraft eligible for registration, such aircraft shall be registered by the Administrator of Civil Aeronautics and the Administrator of Civil Aeronautics shall issue to the owner thereof a certificate of registration.

* * * * *

"(f) Such certificate shall be conclusive evidence of nationality for international purposes, but not in any proceeding under the laws of the United States. Registration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue."

5.

## Federal Aviation Act of 1958

The relevant provisions of the Federal Aviation Act of 1958 (72 Stat. 737, 49 U.S.C. 1301, *et seq.*) are as follows:

"Title IV

"Air Carrier Economic Regulation

"Certificate of Public Convenience and Necessity

"Certificate Required

"Section 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

* * * * *

"Terms, Conditions And Limitations

"(c) Each certificate issued under this section shall specify the terminal and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. * * *

* * * * *

"Compliance With Labor Legislation

"(k) (1) Every air carrier shall maintain rates of compensation, maximum hours, and other working conditions and relations of all of its pilots and copilots who are engaged in interstate air transportation within the continental United States (not including Alaska) so as to conform with decision numbered 83 made by the National Labor Board on May 10, 1934, notwithstanding any limitation therein as to the period of its effectiveness.

"(2) Every air carrier shall maintain rates of compensation for all of its pilots and copilots who are engaged in overseas or foreign air transportation or air transportation wholly within a Territory or possession of the United States, the minimum of which shall not be less, upon an annual basis, than the compensation required to be paid under said decision 83 for comparable service to pilots and copilots engaged in interstate air transportation within the continental United States (not including Alaska).

"(3) Nothing herein contained shall be construed as restricting the right of any such pilots or copilots, or other employees, of any such air carrier to obtain by collective bargaining higher rates of compensation or more favorable working conditions or relations.

"(4) It shall be a condition upon the holding of a certificate by any carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

* * * * *

"Title V

"Nationality and Ownership of Aircraft

"Registration of Aircraft Nationality

"Section 501. (a) It shall be unlawful for any person to operate or navigate any aircraft eligible for registration if such aircraft is not registered by its owner as provided in this section, or (except as provided in section 1108 of this Act) to operate or navigate within the United States any aircraft not eligible for registration: * * *

* * * * * *

"(c) Upon request of the owner of any aircraft eligible for registration, such aircraft shall be registered by the Administrator and the Administrator shall issue to the owner thereof a certificate of registration.

* * * * *

"(f) Such certificate shall be conclusive evidence of nationality for international purposes, but not in any proceeding under the laws of the United States. Registration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue."

6.

THE CHICAGO CONVENTION ON INTERNATIONAL CIVIL AVIATION OF 1944

The relevant provisions of the Chicago Convention on International Civil Aviation of 1944 (61 Stat. 1185) are as follows:

"Article 17

"Aircraft have the nationality of the State in which they are registered."

## APPENDIX B

### (Judgment.)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1958.

No. 16059

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, *Appellant*,

v.

NORTHWEST AIRLINES, INC.

Appeal from the United States District Court for the District of Minnesota.

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No. 16060

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, *Appellant*,

v.

NORTHWEST AIRLINES, INC.

Appeal from the United States District Court for the District of Minnesota.

These causes came on to be heard on the record from the United States District Court for the District of Minnesota, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Memorandum Order, Decision and Final Judgment of the said District Court in these causes be, and the same are hereby, affirmed.

May 29th, 1959.

## APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 16,059-60.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, *Appellant*,

v.

NORTHWEST AIRLINES, INC., *Appellee*.

Appeal from the United States District Court for the District of Minnesota.

[May 29, 1959.]

Ruth Weyand (Lee Leibik and Lee Loevinger were with her on the brief) for Appellant.

Henry Halladay (Dorsey, Owen, Scott, Barber & Marquart, and Edward J. Schwartzbauer were with him on the brief) for Appellee.

Before GARDNER, Chief Judge, VOGEL and MATTHES, Circuit Judges.

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VOGEL, Circuit Judge.

Air Line Stewards and Stewardesses Association, International, hereinafter referred to as the Association, instituted this action by petition to impeach an arbitration award issued in a controversy between employees whom the Association claims to represent and the employer, appellee, Northwest Airlines, Inc., hereinafter referred to as Northwest. The controversy giving rise to the arbitration award arose out of disagreement between the Association and Northwest over the terms and conditions of employment to govern employees of Northwest who are

hired to perform duties as flight service attendants, stewardesses or pursers on the entirely foreign segments of flights between the United States and Japan, Korea, Okinawa, Taiwan, Hongkong or the Philippines. The Association took the position that it was the certified bargaining agent of all persons hired by Northwest within the craft or class of flight service attendants, stewardesses and pursers; that it was willing to admit to full membership Northwest employees within the craft or class and to represent such fairly and nondiscriminatorily, and therefore it had the right and the duty to bargain collectively with Northwest with respect to rates of pay, hours, seniority, and other terms and conditions for such persons. The basic issue is whether or not the Railway Labor Act, 45 U.S.C.A. §§ 151, et seq., as amended to include common carriers by air engaged in interstate or foreign commerce, 45 U.S.C.A. §§ 181, et seq., covers the employees of a common carrier by air who are hired outside the United States and its territories and perform services entirely outside the United States and its territories.

The arbitration award which the Association attempted to impeach in this action provided:

> "(b) This Agreement covers all flight pursers, flight service attendants and stewardesses in the employ of the Company who are employed and assigned within the continental limits of the United States and its territories, and of employees in such positions when assigned to those segments of the Company's international passenger flights which originate or terminate in the United States and its territories, and, also, of employees in such positions when assigned at the discretion of the Company on the international passenger flights except as specifically limited herein.
>
> (1) The Company shall have the right to assign foreign nationals to all cabin attendant positions on all international passenger flights operating over all international routes south and west of Japan includ

ing but not limited to the routes to and from Japan to points in Korea, Okinawa, Formosa, the Philippine Islands, Hongkong, and to and from any other foreign station that the Company many (may) be certificated to serve, except that one employee covered by this agreement in a classification to be selected by the Company will be assigned to such passenger flights.

(2) Foreign national cabin attendants assigned to flights under Paragraph (1) of this section will not come within the jurisdiction or scope of this agreement, nor shall any such foreign national employees be covered by nor subject to any provisions of this agreement: * * *"

The District Court considered the contentions of the Association as hereinafter referred to and in a clear and logical opinion, *Air Line Stewards and Stewardesses Association, International*, Petitioner, v. *Northwest Airlines, Inc.*, Respondent, D.C. Minn., 1958, 162 F.Supp. 684, held that the Railway Labor Act as applicable to air carriers does not include employees who are crew members on flights between points outside the continental United States and its territories, thus sustaining the award. The Association here seeks reversal of that holding.[1]

As we see the problem, it is solely one of proper interpretation of the jurisdictional applicability of the Railway Labor Act, 45 U.S.C. §§ 151, et seq.

The Railway Labor Act, provides, § 151:

"First. The term 'carrier' includes any express company, sleeping car company, carrier by railroad, *subject to the Interstate Commerce Act*, * * *" (Emphasis supplied.)

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[1] Appellant has taken two appeals: (1) From the District Court's June 24, 1958, Order that Final Judgment be entered in accordance with the decision of the Board of Arbitration; (2) the Final Judgment.

And:

"Fifth. *The term 'employee' as used herein includes every person in the service of a carrier* (subject to its continuing authority to supervise and direct the manner of rendition of his service) *who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission* now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: * * *." (Emphasis supplied.)

The Interstate Commerce Act, 49 U.S.C.A. § 1 (2), restricts coverage as follows:

"Transportation subject to regulation

(2) *The provisions of this chapter shall also apply to such transportation of passengers and property, and transmission of intelligence, but only insofar as such transportation or transmission takes place within the United States.* * * *." (Emphasis supplied.)

In 1936 Congress extended the Railway Labor Act to include carriers by air, 45 U.S.C.A. §§ 181-188.

"§ 181. All of the provisions of sections 151, 152, and 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."

"§ 182. *The duties, requirements, penalties, benefits, and privileges* prescribed and established by the provisions of sections 151, 152 and 154-163 *of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though*

> *such carriers and their employees were specifically included within the definition of 'carrier' and 'employee', respectively, in section 151 of this title.'* (Emphasis supplied.)

It seems to us inescapable that the Railway Labor Act, which incorporates by reference pertinent provisions of the Interstate Commerce Act, is limited in its territorial scope by 49 U.S.C.A. § 1 (2), supra. Sections 181 and 182 extend the provisions of the Railway Labor Act to air carriers and their employees. The legislative history of the act which extended the Railway Labor Act to include air carriers and their employees indicates that it was the intention of the Congress by such amendment to give the same range to employees engaged in air transport as would be invoked by men engaged in railroad employment.

The question of the applicability of the act to employees with respect to air flights between points outside the continental United States and its territories is not raised here for the first time. The Court of Appeals for the District of Columbia, in *Air Line Dispatchers Association v. National Mediation Board*, 1951, 189 F.2d 685, certiorari denied 342 U.S. 849, met the issue squarely and held, at page 690:

> "* * * the Act does not extend to an air carrier and its employees located entirely outside the continental United States and its territories."

The Association claims here that the *Air Line Dispatchers* case is distinguishable on the facts as well as "wrongly decided". It is pointed out that the carrier in the *Air Line Dispatchers* case did not conduct flights to or from the continental United States or conduct operations within the continental United States, and that the flight dispatchers performed their work entirely on foreign soil and were not members of the crew of an airplane and did not perform any of their work upon or within any airplane. Such distinguishing factors, however, were not

made the basis of the court's decision in the *Air Line Dispatchers* case. The court there held, without equivocation or exception whatsoever, that the Railway Labor Act as extended to include air carriers was limited to the continental United States and its territories. We agree with the District Court that the *Air Line Dispatchers* case is in point and persuasive.

Of significance here is a Senate committee's conclusion in 1955 that the Railway Labor Act had been interpreted by the National Mediation Board and the United States Court of Appeals for the District of Columbia not to cover employees based abroad and the Congress' failure to thereafter amend the act so as to include such employees. The committee stated:

> "The act as it is presently worded has been interpreted by the National Mediation Board and the courts not to extend to employees of air carriers based outside the continental limits of the United States and its territories. In 1949, the National Mediation Board ruled that title II of the Railway Labor Act does not cover foreign-based employees. The Board's ruling was based on the view that to extend the act to cover employees based abroad would bring this labor legislation into direct conflict with labor laws of foreign countries. In addition, the Board held that to attempt application of the Railway Labor Act in a foreign country, rather than the law of the country, would be a challenge to its national sovereignty to govern within its own boundaries. It was noted that the United States would rightly reject any attempt of a foreign government to apply its labor laws in this country. This determination by the National Mediation Board as to the construction of the present language regarding jurisdiction appearing in section 201 of the Railway Labor Act was later upheld by the District of Columbia Court of Appeals in *Air Line Dispatchers Association* v. *National Mediation Board* (189 F.2d 685) (1951).
>
> In addition, it was pointed out in the testimony that an attempt to give extraterritorial effect to the Rail-

way Labor Act would run counter to a long-established doctrine that the labor laws of one country should not be given extraterritorial effect and applied in a foreign country. In order to adopt the amendment proposed, the committee would give our laws an application contrary to the decision of the court mentioned above but also contrary to a long-recognized policy by this country. This would invite the imposition of foreign labor standards upon employees of foreign industry residing in this country.

The testimony offered was conflicting. *Representatives of the Air Line Dispatchers Association, A. F. of L., argued for the application of the Railway Labor Act to employees based abroad, and the spokesmen for the Airlines Personnel Relations Conference and the Air Transport Association opposed such amendment for the reasons stated above. On the testimony offered the committee would not be justified in making such a sharp departure from long-established American policy as is proposed in this bill.*" Sen. Doc. No. 163, 83rd Cong., 2nd Sess. Aviation Study 69-70 (1955). (Emphasis supplied.)

We think the foregoing report persuasive of legislative recognition of the construction of the Act by both the Mediation Board and the Court of Appeals to the effect that the Act is non-extraterritorial and that Congress' failure to amend thereafter as indicating agreement with such construction. See *Apex Hosiery Co.* v. *Leader, et al.*, 1940, 310 U.S. 469, 488.

The appellant argues that the Railway Labor Act imposes upon the representative chosen by the majority to represent all members of the craft or class the duty to represent them without discrimination. *Steele* v. *Louisville & Nashville R. R. Co.*, 1944, 323 U.S. 192, 202-204. It argues that the application by the Mediation Board and the District Court of a nondiscriminatory law in a manner which discriminates between persons because of citizenship or race violates the Constitution of the United States, citing *Yu Cong Eng* v. *Trinidad*, 1926, 271 U.S. 500, 525.

It says that the award of the Mediation Board as upheld by the District Court

> "* * * solely on the basis of their lack of citizenship, completely deprives foreign nationals serving under our flag, of their right to have the Association serve as their representative in the interests of securing for them better rates of pay and terms and conditions of employment. It completely excludes foreign nationals from access to the system board of adjustment and representation by the Association in the handling of grievances. It perpetuates pay differentials to the extent that a foreign national serving as a hostess on the same plane with an American hostess receives less than half as much pay as the American hostess, though both are working together performing exactly the same duties."

We are unable to agree with the appellant. The construed exclusions from coverage under the Railway Labor Act are in no way based upon race, color, citizenship or national origin. Such exclusions are applicable to any one employed and performing service outside the continental United States and its territories. As viewed by the Mediation Board and the District Court, the Railway Labor Act, as it pertains to common carriers by air, has no application outside the continental United States and its territories. By its terms, it fails to apply to employees who are hired and who perform services completely outside the United States and its territories. We see no necessity for discussing here the constitutionality of an award if such award should have excluded foreign nationals on the basis that they were such. That is not our situation.

The Association also contends:

> "Under the principle of the law of the flag which by treaties with all involved nations, and by accepted international law, governs employment relations on board an airplane, Congress had power to make the Railway Labor Act applicable to all members of

> crews of American flag airplanes without limitation as to their citizenship, place of domicile, place of contract, or place of flight." * *

It further argues that because of the law of the flag the application of the Railway Labor Act to employees serving upon American flag airplanes on flights between foreign ports, over foreign territory or over the high seas does not constitute an extraterritorial application of the statute, its position being that:

> "Each American flag airplane is territory of the United States, for most purposes of law. Each American flag airplane continues to constitute territory of the United States wherever it goes, whether in flight over the high seas or foreign lands. * * *."

First, we agree that Congress does have the power to make the Railway Labor Act applicable to employees employed on American flag airplanes and who work wholly outside the United States. See *United States* v. *Flores*, 1933, 289 U.S. 137, 150, 155, etc. The point is that the Congress specifically has not done so. Secondly, as already pointed out, supra, the Interstate Commerce Act, which was incorporated by reference into the Railway Labor Act, definitely limited applicability "* * * only insofar as such transportation or transmission takes place within the United States. * * *" and by Section 182, supra, the Railway Labor Act applies to carriers by air and their employees "in the same manner and to the same extent," which makes it clear that carriers by air and carriers by railroad are covered only to the extent that the commerce or transportation in which they are involved takes place within the United States.

In *Cunard S. S. Co.* v. *Mellon*, 1923, 262 U.S. 100, the court was concerned with the applicability of the 18th Amendment and the National Prohibition Act to both foreign and American flag vessels when within the territorial waters of the United States and also with reference

to American flag vessels when outside the territorial waters of the United States. The 18th Amendment made its provisions applicable to "* * * the United States and all territories subject to the jurisdiction thereof * * *." The National Prohibition Act, 41 Stat. 305 (1919), as amended 42 Stat. 222 (1921), provided that it "* * * shall apply not only to the United States but to all territories subject to its jurisdiction," which was construed by the Supreme Court to mean that its field coincided with that of the 18th Amendment, page 127 of 262 U.S. Obviously, if the Association's contention here with reference to the law of the flag, its applicability to American flag airplanes, and the latter constituting territory of the United States is correct, then foreign vessels sailing under the flags of foreign countries would be territories of the countries whose flags they flew and would not be subject to the 18th Amendment and the National Prohibition Act, even while they were within the territorial waters of the United States and likewise the 18th Amendment and the National Prohibition Act would cover domestic ships while flying the flag of the United States outside the waters of the United States, whether upon the high seas or in territorial waters of a foreign country. In meeting the question, the Supreme Court said, at page 122 of 262 U.S.:

> "Various meanings are sought to be attributed to the term 'territory' in the phrase 'the United States and all territory subject to the jurisdiction thereof.' We are of opinion that it means the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power. The immediate context and the purport of the entire section show that the term is used in a physical and not a metaphorical sense, that it refers to areas or districts having fixity of location and recognized boundaries. See *United States* v. *Bevans*, 3 Wheat. 336, 390.
>
> * * * * *

The defendants contend that the Amendment also covers domestic merchant ships outside the waters of the United States, whether on the high seas or in foreign waters. But it does not say so, and what it does say shows, as we have indicated, that it is confined to the physical territory of the United States. In support of their contention the defendants refer to the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor. *Scharrenberg* v. *Dollar S. S. Co.*, 245 U.S. 122, 127; *In re Ross*, 140 U.S. 453, 464; 1 Moore International Law Digest, § 174; Westlake International Law, 2d ed., p. 264; Hall International Law, 7th ed. (Higgins), § 76; Manning Law of Nations (Amos), p. 276; Piggott Nationality, Pt. II, p. 13. The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty. See *The Hamilton*, 207 U.S. 398, 403; *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 355; 1 Oppenheim International Law, 3d ed., §§ 123-125, 128. It is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign. 2 Moore International Law Digest, §§ 204, 205; Twiss Law of Nations, 2d ed., § 166; Woolsey International Law, 6th ed., § 58; 1 Oppenheim International Law, 3d ed., §§ 128, 146, 260."

The court held, at page 128:

"Examining the act as a whole, we think it shows very plainly, *first, that it is intended to be operative throughout the territorial limits of the United States,* * * *secondly, that it is not intended to apply to domestic vessels when outside the territorial waters of the United States*, and, thirdly, that it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters. * * *" (Emphasis supplied.)

The holding of applicability of the law to ships carrying the flags of foreign nations while in territorial waters of the United States and nonapplicability to ships flying under the flag of the United States while outside the territorial waters of the United States is a distinct repudiation of the Association's theory that for the purposes here involved airplanes are a part of the territory of the country whose flag they fly.

Of equal cogency is the earlier case of *Schauenberg v. Dollar S. S. Co., et al.*, 1917, 245 U. S. 122, 127, where the Supreme Court stated:

> "Equally unallowable is the contention that a ship of American registry engaged in foreign commerce is a part of the territory of the United States in such a sense that men employed on it can be said to be laboring 'in the United States' or 'performing labor in this country.' It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative (International Law Digest, Moore, vol. I, § 174), and *to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible.* Thus the seamen employed on the 'Mackinaw' were not within either the spirit or the letter of the law on which the petitioner bases his action and in any point of view his contention is fanciful and unsound and must be denied." (Emphasis supplied.)

We think that to sustain coverage under the Railway Labor Act for the employees here involved without specific statutory direction so to do and solely on the basis that they serve in airplanes flying the flag of the United States would do violence to the holding in both the *Coward* and *Schauenberg* cases.

In construing the Railway Labor Act in this case, we have in mind the rule that unless there is an explicit and

unequivocal showing of a contrary intent. Acts of Congress are to be given an interpretation which is domestic in nature. In *Foley Bros. v. Filardo*, 1949, 336 U. S. 281, the Supreme Court had before it the applicability of the Eight Hour Law, 40 U.S.C.A. § 324, as amended by 40 U.S.C.A. § 325a, to work done under a contract between the United States and a private contractor on construction projects in Iraq and Iran. In holding the law inapplicable to the contract involved, Mr. Justice Reed, speaking for the Supreme Court, stated at page 285:

> "*First*. The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, *Blackmer v. United States*, *supra*, at 437, is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions."

Applying that "canon of construction" to the Railway Labor Act and also giving heed to 49 U.S.C.A. § 1 (2) which limits its applicability to transportation or transmission which takes place within the United States, we are forced to the conclusion that the act is strictly limited to the continental United States and its territories and does not include the employees here concerned.

The Association also argues the desirability of having the Railway Labor Act applicable to all employees alike, whether they be hired in foreign territory for service between foreign points or otherwise. Such argument addresses itself to the Congress and not to the courts.

Affirmed.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

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JAMES R. BROWNING, Clerk

# In the Supreme Court of the United States

OCTOBER TERM 1959

No. 429

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL

*Petitioner*

vs.

NORTHWEST AIRLINES, INC.

*Respondent*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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# In the
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No. 429

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AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL

*Petitioner*

vs.

NORTHWEST AIRLINES, INC.

*Respondent*

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

Northwest Airlines, Inc. respectfully prays that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in the above entitled case dated May 29, 1959 be in all respects denied.

## STATUTES AND TREATIES INVOLVED

Pertinent provisions of the Civil Aeronautics Act of 1938, *52 Stat.* 973, 978, *49 U. S. C.*, §401 (20), The Federal Aviation Act of 1958, *72 Stat.* 737, *49 U. S. C. A.*, §1301 (20) (1958 Supp.), Air Commerce Act of 1926, *44 Stat.* 568, *49 U. S. C.*, §171, Motor Carrier Act, as amended

July 22, 1954, c. 563, §1, *68 Stat.* 526, *49 U. S. C. A.*, §303 (a)(11) (1958 Supp.), Water Carrier Act, as amended *54 Stat.* 929, *49 U. S. C.*, §902 (i), Lanham Trade Mark Act, *60 Stat.* 427, 443, *15 U. S. C.*, §1127, and the Chicago Convention on International Civil Aviation, *61 Stat.* 1180, which are involved in this case (in addition to the provisions cited by petitioner) are set forth in Appendix I.

## STATEMENT OF THE CASE

Northwest Airlines, Inc. (hereinafter called "Northwest") is a common carrier by air engaged in interstate commerce, commerce between the United States and foreign nations, and commerce between foreign nations. The Air Line Stewards and Stewardesses Association, International (hereinafter called the "Association") is a labor union which has been certified by the National Mediation Board to represent "flight pursers, flight service attendants and stewardesses, employees of the Northwest Airlines, Inc., for the purposes of the Railway Labor Act" (R. p. 125). On the other hand, certain foreign labor organizations are recognized in their respective countries as exclusive bargaining agents for employees based in their respective territories. For example, the Northwest Airlines Philippines Employees Association (NAPEA) has been certified by the Philippine Government as the exclusive bargaining agent for employees of the appellee employed at or out of the Philippine Islands (R. p. 186). The certification of NAPEA was made pursuant to Philippine Republic Act No. 875, which contains provisions regarding the rights of employees to organize, the internal procedures of unions, and a procedure for certification of an exclusive bargain-

ing agent for an appropriate unit which need not be based upon craft or class considerations (R. p. 180). The employees of Northwest represented by NAPEA are the 51 (as of June, 1957) employees based in Manila. Of these, 47 are Philippine Nationals. At the other stations of the appellee South and West of Tokyo, 90% of its employees are foreign nationals (Tr., NWA Ex. No. 17). Philippine Commonwealth Act. No. 103, presently in effect, created a Court of Industrial Relations which has jurisdiction over conditions of employment and the relationship between management and labor. That Act also provides that any violation of the Act or of an order of the Court may result in suspension or revocation of a foreign employer's permission to do business in the Philippines (R. p. 179).

The collective bargaining agreement between Northwest and the Association which was in effect for some time prior to the arbitration award involved herein, and which was modified only slightly thereby, provided, with regard to the employees covered by the agreement:

> "This agreement covers all flight pursers, flight service attendants and stewardesses in the employ of the company *except those hired outside the continental United States for service at a foreign base*" (R. p. 49). (Italics supplied.)

A grievance had been filed by a group of Northwest's employees alleging that Northwest had no right under the above-cited agreement, to hire foreign nationals for service on routes south of Tokyo (R. p. 46). An award made thereunder was disposed of by settlement, and is not here involved (R. p. 47). Thereafter, in order to make it clear that it had the right to hire foreign national employees for service on segments of its operations not covered by its agreement with the Association, Northwest proposed cer-

tain clarifying amendments to the agreement (R. pp. 39-43, 49). The Association would not agree to the amendments, and the dispute was submitted to an arbitration board which was authorized by Northwest and the Association to make a final and conclusive determination of what portion, if any, of the proposed amendments to the agreement should be adopted (R. pp. 10-15). The "award" of the board continued in effect, without substantial change, the provision as to the employees covered:

> "This Agreement covers all flight pursers, flight service attendants and stewardesses in the employ of the Company who are employed and assigned within the continental limits of the United States and its territories, and of employees in such positions when assigned to those segments of the Company's International passenger flights which originate or terminate in the United States and its territories, and, also, of employees in such positions when assigned at the discretion of the Company on other international passenger flights except as specifically limited herein."

With reference to the specific question which gave rise to the arbitration, the board determined that it was "right and just" (R. p. 50) that Northwest have the right to assign foreign nationals as cabin attendants on routes south and west of Japan, but determined that Northwest must assign to such passenger flights one employee covered by the agreement (i.e., employed and assigned within the continental United States). Northwest's remaining proposals (changes in seniority and vacancies clauses, etc., made in order to conform such clauses with the provisions permitting assignment of foreign nationals on routes south and west of Japan) were granted in full (R. p. 17). The action below was commenced by the Association to impeach the award of the board. The United States District Court

for the District of Minnesota entered judgment affirming the award. The petition before this Court seeks review of the judgment of the United States Court of Appeals for the Eighth Circuit which affirmed the judgment of the District Court. Except as otherwise indicated above and in the argument which follows, the Association's Statement of the Case is essentially correct and will not be repeated.

## SUMMARY OF ARGUMENT

This case does not present to this Court the broad problem of "what law governs employment relationships on board American flag airplanes when flying beyond the physical boundaries of the United States" (petitioner's brief, p. 10). Since the action below was one to impeach the decision of an arbitration board empowered by the parties to a collective bargaining agreement to make amendments to the agreement, the only "broad" question is whether there is something illegal about the amended contract here involved because it fails to stipulate the terms of employment of persons hired abroad to work on international passenger flights between points in the Orient—flights which never touch our shores. The interpretation of the Railway Labor Act advanced by the Association to support its theory that the contract is illegal is one which has consistently been rejected by this Court in connection with related statutes.

It is an interpretation rejected by the National Mediation Board and by the United States Court of Appeals for the District of Columbia in a case almost identical to the present one, where certiorari was denied by this Court. See *Air Line Dispatchers Ass'n. v. National Mediation Board*, 189 F. 2d 685 (D. C. Cir.), *cert. denied* 342 U. S. 849 (1951).

And it is an interpretation rejected by the United States Congress in its consideration of the Federal Aviation Act of 1958, 72 *Stat.* 737.

No question of Private International Law (conflicts of laws) is presented because Congress itself has clearly defined the territorial scope of the Railway Labor Act by providing that its application is limited to "transportation [that] takes place within the United States."

No question of constitutional law arises because the contract is not limited in its coverage to United States citizens. It does not "discriminate" against anyone by failing to stipulate the employment terms of persons hired and working in the Orient, but if it did, the discrimination would be in complete accord with the territorial scope of the Act itself in that the contract does not purport to cover persons —citizens and aliens alike—who are employed for service entirely outside the United States. We are aware of no authority which holds that *Congressional failure* to provide rights for a certain class of persons is unconstitutional. Moreover, even assuming the award discriminated on the basis of nationality, we are likewise unaware of any authority that the United States Constitution confers rights upon aliens outside the United States.

## ARGUMENT

1. The decision of the arbitration board and both courts below does not upset any "bargaining pattern" in the airline industry. We find nothing in the Association's reference to pages 129-132 of the record—except the legal conclusion of the president of an air line pilots union (R. p. 130)—to support the statement that for fifteen years that union has maintained agreements applicable to pilots who fly *wholly* outside the United States. Any practice of

extending the benefits of collective bargaining agreements to employees originally based within the United States but subsequently transferred to foreign locations (R. pp. 181-185), can hardly establish a pattern of bargaining by an American union with respect to the rights or obligations of American and foreign employees stationed in distant places in the world. The actual practice in negotiations respecting the rights of foreign-based employees is to negotiate with foreign unions certified by the appropriate foreign agency as the exclusive bargaining agent for employees based in the country involved (R. pp. 185-186).

2. The action of the National Mediation Board in amending its certification of the Association so as to authorize it to represent overseas flight pursers is no evidence of a practice of applying the Act to foreign-based employees. While the flight pursers were and are employed on "overseas operations" the Board's certification contains no indication that it applies to flight pursers used only on wholly foreign point-to-point flights rather than flights between the United States and a single foreign point (R. pp. 122-123). The Board's official position that it has no authority to certify a bargaining agent for employees who work solely outside the United States may be found in National Mediation Board, 15th Annual Report 10 (1949) and in the decision in *Air Lines Dispatchers Ass'n. v. National Mediation Board, supra* which was an affirmance of the Board's refusal to investigate a representation dispute among such employees. This position has been adhered to by the Board ever since. The action of the Board with respect to the authority of the Association to represent employees of Northwest who perform services on flights or segments of flights commencing or terminating in the United States may or may not be relevant in determining the

territorial scope of the Railway Labor Act. But since the award involved in this case *does* extend the benefits and obligations of the bargaining agreement to employees assigned to those segments of Northwest's flights, the only issue which this Court could review is whether the Association is the exclusive bargaining representative of employees hired and working exclusively in foreign countries. As to this issue, the Board's action with respect to Northwest's "overseas" pursers is completely immaterial.

3. The case of *Air Line Dispatchers Ass'n. v. National Mediation Board, supra*, was an affirmance by the District of Columbia Court of Appeals of a decision of the National Mediation Board holding that its jurisdiction and the territorial scope of the Railway Labor Act were limited to the United States and its territories. After certiorari was denied by this Court, the unions took the issue to the 83rd United States Congress, which was considering the omnibus aviation bill (then S.2647) which ultimately became the Federal Aviation Act of 1958. One section of that bill proposed to *amend* the Railway Labor Act so as to make it applicable to air carrier employees based outside the United States. The aforementioned decisions of the National Mediation Board and the District of Columbia Court of Appeals were specifically called to the attention of the Committee on Interstate and Foreign Commerce, which expressly approved those decisions and concluded that the proposed amendment should not be adopted. See Sen. Doc. No. 163, 83rd Cong., Fed. Sess. Aviation Study 69-70 (1955) (set forth in Appendix II to this brief). Thus, the Federal Aviation Act of 1958, *72 Stat.* 737, *49 U. S. C. A.*, §§1301 *et seq.* (1958 Supp.) deliberately failed to include the proposed amendment. It has long been an established principle that the silent acquiescence of Congress in the

interpretation given a statute by the agency charged with its administration indicates Congressional approval. E.g., *United States v. Shreveport Grain and Elev. Co.*, 287 U. S. 77, 84 (1932). Moreover, if an administrative or judicial interpretation is specifically brought to the attention of Congress in connection with attempts to change the statute, there is even more reason for holding that Congressional inaction constitutes Congressional approval of the interpretation. *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 487-489 (1940). The position advanced before this Court by the Association was specifically rejected, as a matter of policy, by the United States Congress. The Association is now asking this Court to review and reverse that Congressional policy decision.

4. The Association took the position before the arbitration board, before both the lower courts and still takes the position that there is something in the language of Section 201 of the Act, *45 U. S. C.*, §181, which requires application of the Act to every employee of carriers by air, engaged in interstate or foreign commerce, wherever the employees may be based. Actually, the express provisions of the Railway Labor Act, incorporating by reference the pertinent provisions of the Interstate Commerce Act, make it clear that the former Act is applicable to foreign commerce only insofar as that commerce takes place within the United States. Section 202 of the Act, *45 U. S. C.*, §182, provides that the duties, etc. established by Title I of the Act:

> "* * * shall apply to said carriers by air and their employees *in the same manner and to the same extent* as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee', respectively, in section 1 thereof." (Italics supplied.)

The term "said carriers by air" refers to the phrase "every common carrier by air engaged in interstate or foreign commerce and every carrier by air transporting mail for or under contract with the United States Government," found in Section 201, *45 U. S. C.*, §181. Section 1, First of the Act, *45 U. S. C.*, §151, First, provides:

> "The term 'carrier' includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act * * *."

And Section 1 (2) of the Interstate Commerce Act, *49 U. S. C.*, §1 (2) provides:

> "The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, * * *."

Thus, contrary to the Association's purported analysis (petitioner's brief, pp. 13-15), Section 1 of the Railway Labor Act as expanded by Sections 201 and 202 and incorporating Section 1 of the Interstate Commerce Act, in effect reads as follows:

> "First. The term 'carrier' includes any express company, sleeping car company, carrier by railroad, or carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, but only in so far as such commerce or transportation takes place within the United States."

Moreover, the legislative history of the Amendment which brought air carriers under the Act makes it quite clear that the Amendment was intended to do nothing more than make the Act apply with uniformity to both classes of car-

riers and both classes of employees. U. S. Senate, 74th Cong., 1st Sess., Hearings Before a Subcommittee of the Committee on Interstate Commerce on S. 2496 at 8, 12, 16 (1935) (set forth in Appendix III to this brief).

Without question, Northwest is engaged in foreign commerce, transports mail, and is under contract with the United States Government. Therefore, by virtue of Section 201, the Railway Labor Act "applies" to Northwest. But to what phases of its operations and to which employment relationships; or stated differently, in what manner and to what extent does the act apply? By Section 202 it applies "in the same manner and to the same extent" as though carriers by air engaged in foreign commerce or transporting mail were specifically "included within" or made a part of Section 1, which makes it clear that carriers by air, like carriers by railroad, are covered only to the extent that the commerce or transportation in which they are involved takes place within the United States. Manifestly, this question of the "manner and extent" of coverage of air carriers is not a concern of Section 201, but the concern only of Section 202.

But even if Section 201 provided the only reference for coverage under the Act, the mere fact that the section refers to carriers engaged in "foreign commerce" would not mean the act was applicable to transportation solely between two foreign points. The Association cites no congressional definition of "foreign commerce" which would include such transportation, and as a matter of fact, every statutory definition of "foreign commerce" we have found excludes transportation solely between two foreign points. The now-repealed Civil Aeronautics Act of 1938 and the recent Federal Aviation Act of 1958, for example, define "foreign air commerce" as commerce between "a

place in the United States and any place outside thereof * * *". *49 U. S. C.*, §401 (20) (c); *49 U. S. C. A.*, §1301 (20) (c) (1958 Supp.). See also the definitions found in the Air Commerce Act of 1926, *49 U. S. C.*, §171, the Motor Carrier Act, *49 U. S. C. A.*, §303 (a) (11) (1958 Supp.), and the Water Carrier Act, *49 U. S. C.*, §902 (i) (3). "Overseas air commerce" within the Civil Aeronautics Act of 1938 and the Federal Aviation Act means commerce between a state and a possession of the United States or between two possessions of the United States. *49 U. S. C.*, §401 (20) (b) and *49 U. S. C. A.*, §1301 (20) (b) (1958 Supp.).

There is little that can be said in favor of the Association's argument (Petition p. 12) that because compliance with the Air Carrier Amendment to the Railway Labor Act is by the Civil Aeronautics Act made a condition to the holding of a certificate to engage in "foreign air commerce" and "overseas air commerce", the coverage of the Railway Labor Act is expanded to include commerce between two foreign points. The simple and complete answer to this argument is that the Civil Aeronautics Act iself and the definitions found therein are, as has been shown, not applicable to commerce between two foreign points. Hence, no certificate is necessary to authorize transportation between such points. *Lineas Aereas Costarricenses, S. A.*, 18 C. A. B. 552, 557-558 (1954); *Latin American Air Freight Case*, 16 C. A. B. 107, 100 (1952). In any event, Section 401 (l) (4) of the Civil Aeronautics Act, *49 U. S. C.*, §481 (l) (4), requiring compliance with the Railway Labor Act is manifestly nothing but an enforcement section. It does not answer the question of what *constitutes* necessary compliance with the Railway Labor Act; therefore, the Association's argument is an example of question-begging at its very best.

5. Even if there were room for judicial interpretation of the Air Carrier Amendment to the Railway Labor Act to determine its territorial scope—in spite of its specific limitation to transportation within the United States—the problem of interpretation would not be a substantial one demanding review by this Court. Section 201 of the Act (part of the Air Carrier Amendment), *45 U. S. C.*, §181 uses the general words "every common carrier" and "every employee". But this Court and other federal courts have held on many occasions that despite the use of terms of such apparently universal application, United States Statutes are presumed to operate only domestically. *Foley Bros., Inc. v. Filardo*, 336 U. S. 281 (1949); *New York Central R. R. v. Chisholm*, 268 U. S. 29 (1925); *Neilson v. Rhine-Shipping Co.*, 248 U. S. 205 (1918); *Sandberg v. McDonald*, 248 U. S. 185 (1918); *American Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909); *Blackmer v. United States*, 284 U. S. 421, 437 (1932); *United States v. Bowman*, 260 U. S. 94, 98 (1922); *Chandler v. United States*, 171 F. 2d 921 (1st Cir.), *cert. denied*, 336 U. S. 918, *rehearing denied* 336 U. S. 947 (1949); *O'Neil v. Cunard White Star, Ltd.*, 160 F. 2d 446 (2nd Cir.), *cert. denied* 332 U. S. 773 (1947); *The State of Maine*, 22 Fed. 734 (S. D. N. Y. 1884).

The cases cited by the Association (Petition, p. 16) relating to the Sherman and Lanham Acts are not persuasive authority as to this issue. The basic doctrine that the Sherman Act does not apply outside the United States was stated by Mr. Justice Holmes in *American Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909), and continues to be applied in recent decisions. *E.g., United States v. General Electric Co.*, 82 F. Supp. 753, 842 (D.N.J. 1949). And while the *American Banana* case may or may not have

continued vigor in view of the increasing tendency of the courts to find that out-of-the-country operations are part of a conspiracy to maintain a domestic monopoly, *e.g.*, *United States v. R. P. Oldham Co.*, 152 F. Supp. 818 (N. D. Calif. 1957); *United States v. General Electric Co.*, *supra*, it is clear that what is forbidden by the Sherman Act is a monopoly by U. S. citizens in domestic trade, and not a monopoly existing somewhere else in the world.

The Lanham Act cases are clearly distinguishable since Congress, in enacting that statute, chose specifically to define "commerce" as "all commerce which may lawfully be regulated by Congress" *15 U. S. C.*, §1127. As pointed out in *Steele v. Bulova Watch Co.*, 344 U. S. 280 (1952), there is no rule of international law which debars the United States from governing the conduct of *its own citizens* when the rights of other nations or their nationals are not infringed. Thus, in the *Steele* case and others following it, the decision depended upon the extent of Congressional power to deal with the conduct of American citizens in other parts of the world. They were not concerned with a problem of statutory construction.

This Court's decision under the Fair Labor Standards Act, *Vermilya-Brown Co. v. Connell*, 335 U. S. 377 (1948) held only that a leasehold was a "possession" of the United States within the meaning of that Act. See *Foley Bros., Inc. v. Filardo*, *supra* at 285, and see especially the concurring opinion of Justices Frankfurter and Jackson at 291-296, indicating that the *Vermilya-Brown* case is of doubtful value as a precedent.

6. There is little point in discussing each of the many cases cited by the Association (Petition, pp. 17-19) concerning the "law of the flag" doctrine and its applica-

bility to seagoing vessels. We think it is clear that the Railway Labor Act is applicable, by its terms, only to transportation that takes place within the United States. That being so, we believe that no principles of international law will lead this Court to conclude that the Act covers completely foreign transactions. In any event, the Court will see that most of the decisions cited by the Association, including *Romero v. International Term. Co.*, 358 U. S. 254 (1959), and *Lauritzen v. Larsen*, 345 U. S. 571 (1953) are concerned only with the choice of law rule applicable with respect to maritime torts. The decision of this Court most nearly apropos, *Scharranberg v. Dollar S. S. Co.*, 245 U. S. 122 (1917), recognizes that the law of the flag doctrine is figurative only, and cannot be expanded to the extent of treating seamen employed on a ship as working in the country of its registry.

But the decisions with respect to the choice of law rule applied to seagoing vessels are not in point for other reasons, one of which is that, contrary to the Association's contention, it is *not* settled international law that airplanes are subject to the same law of the flag as ships at sea. Furthermore, the choice of law rules of many countries are not in accord with the law of the flag doctrine. See *R. v. Martin*, (1956), 2 All Eng. L. R. 86; McNair, *The Law of the Air*, 108-110, 112 (2nd ed. 1953); Feuston and De Saussure, *Conflicts in the Competence and Jurisdiction of Courts of Different States to Deal with Crimes Committed on Board Aircraft and the Persons Involved Therein*, 1 McGill L. J. 66, 68, 85-86 (1952); Comment, *Aviation Law: Recent Developments in Latin America*, 10 Miami L. Q. 515 (1956); *Crimes Committed on Board Aircraft*, 106 L. J. 419 (1956). Article 17 of the Chicago Convention on Civil Aviation of 1944, 61 *Stat.*, 1180, relied upon by the

Association, establishes only that aircraft have a "nationality" which is determined by the place of registration. This is not equivalent to saying that the laws of the place of registration govern all judicial events and relationships aboard such aircraft. McNair, *op. cit. supra*, at 109. And Article I of the Convention recognizes that while flying over the territory of any state, aircraft are subject to the exclusive sovereignty of that state. If the labor laws of the flag nation alone were to govern the crew of all aircraft, then the laws of the subjacent sovereign state would, to that extent be superseded. Foreign-based employees of American carriers would be held subject to this nation's labor laws, even though we could not be sure that the foreign sovereign nation concerned would agree. On the other hand, American members of the crew of a foreign carrier operating between points in this country would be subject to foreign laws and standards, although those standards might be repugnant to American ideals and policies as well as American laws.

If international law is relevant to a consideration of this petition, we think it apparent that it is not because international law requires application of the Railway Labor Act to employment relationships having no connection with commerce taking place within the United States; instead, it is because the unsettled state of international law should lead this Court to recognize that any decision to overrule the holding of the Court of Appeals should be made by the United States Congress and that this Court should refrain from altering established precedent in this delicate field.

7. The Association seeks to raise supposed constitutional questions based on the current trend of decisions

which emphasize human rights in the field of racial relations. It argues that the judgment of the district court upholding the contract is unconstitutional because it "adopts the 'discrimination [in the contract]." (Petition, p. 20).

We might concede for the purposes of this petition that the Due Process Clause of the Fifth Amendment provides as much protection against discriminatory action by the Federal Government as the equal protection clause of the Fourteenth Amendment protects against discriminatory action by the states. We might even concede—although none of this Court's decisions have so held—that the United States Constitution prevents discrimination against aliens outside the United States. Nevertheless, no constitutional issue of any substance is raised by the Court of Appeals' decision. If this Court agrees that, as a matter of statutory interpretation, the association does not represent aliens working in foreign countries, no constitutional question similar to that raised (but not decided) in *Steele v. Louisville & Nashville R. R.*, 323 U. S. 192, 198 (1944), would be presented upon a review of the decision of the Court of Appeals. On the other hand, if this Court did not agree with that interpretation, there would be no need to reach any constitutional question. Similarly, if this Court agrees that the Act is not applicable to foreign-based employees, then—since the contract is in perfect conformity with the Act—the Association's only complaint is that Congress has *failed* to provide rights to a certain class of persons. It is elementary, of course, that Congressional failure to act cannot be unconstitutional. *Oliphant v. Brotherhood of Locomotive Firemen*, 262 F. 2d 359, 363 (6th Cir. 1958), *cert. denied* 359 U. S. 935 (1959).

Moreover, it has been seen that the heart of the award of the arbitration board is that the modified agreement

covers all employees in the craft employed and assigned within the United States and excludes only those, whether citizens of the United States or other countries, who are not so employed and assigned. Therefore, the Court of Appeals was obviously correct in concluding that the contract did not exclude foreign nationals on the basis that they were such.

Even more fundamental, perhaps, is the plain fact that the amended contract does not "discriminate" against anyone. It does not provide that United States-based employees are entitled to one rate of pay while foreign-based employees are entitled to another. The contract simply contains no provisions concerning the rates of pay, etc., for foreign-based employees for the very logical reason that the terms of employment for foreign-based employees are not the subject matter of the contract here involved but are covered by contracts between Northwest and the employees themselves or bargaining representatives of their own choosing. How can a contract discriminate against a class of persons by saying nothing about them? In *Barrows v. Jackson*, 346 U. S. 249 (1953), *Shelley v. Kraemer*, 334 U. S. 1 (1948), and *Steele v. Louisville & Nashville R. R., supra*, there was positive, hostile discrimination involved in the contracts held illegal or unenforceable. Here, however, nothing in the contract prevents foreign-based employees from bargaining for and obtaining terms of employment more favorable than those obtained for employees based in this country. Judicial approval of such a contract can hardly constitute unconstitutional discrimination by the United States Government.

## CONCLUSION

For the foregoing reasons, the Association's petition for a writ of certiorari should be denied.

Respectfully submitted,

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## APPENDIX I

### A

Civil Aeronautics Act of 1938, Section 1(20), *52 Stat.*, 978, *49 U. S. C.*, §401(20):

" 'Interstate air commerce', 'overseas air commerce', and 'foreign air commerce', respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any state of the United States, or the District of Columbia, and a place in any other state of the United States, or the District of Columbia; or between places in the same state of the United States through the air space over any place outside thereof; or between places in the same territory or possession of the United States, or the District of Columbia;

(b) a place in any state of the United States, or the District of Columbia, and any place in a territory or possession of the United States; or between a place in a territory or possession of the United States, and a place in any other territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

B

Federal Aviation Act of 1958, Section 101(20), 72 Stat. 737, 49 U. S. C. A. §1301(20) (1958 Supp):

" 'Interstate air commerce', 'overseas air commerce', and 'foreign air commerce', respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any state of the United States, or the District of Columbia, and a place in any other state of the United States, or the District of Columbia; or between places in the same state of the United States through the airspace over any place outside thereof; or between places in the same territory or possession of the United States, or the District of Columbia;

(b) a place in any state of the United States, or the District of Columbia, and any place in a territory or possession of the United States; or between a place in a territory or possession of the United States, and a place in any other territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

C

Air Commerce Act of 1926, Section 1, 44 Stat. 568, 49 U. S. C. §171:

"As used in sections 171, 174-177, and 179-184 of this title, the term 'air commerce' means transportation in whole or in part by aircraft of persons or property for hire, navigation of aircraft in furtherance of a business, or navigation of aircraft from one place to another for operation in the conduct of a business. As used in said sections, the term 'interstate or foreign air commerce' means air commerce between any state, territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same state, territory, or possession, or the District of Columbia, but through the air space over any place outside thereof; or wholly within the air space over any territory or possession or the District of Columbia. May 20, 1926, c. 344, §1, 44 Stat. 568."

D

Motor Carrier Act, as amended, 68 Stat. 526, 49 U. S. C. A., §303(a)(11) (1958 Supp.):

"The term 'foreign commerce' means commerce, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water, (A) between any place in the United States through a foreign country; or (B) between any place in the United States and any place in a territory or possession of the United States insofar as such transportation takes place within the United States. The term 'foreign commerce' also includes transportation between places in a foreign country, or between a place in one foreign country and a place in another foreign country, insofar as such transportation takes place within the United States, but only for purposes

of the application, to carriers engaged in such transportation, of the following provisions of this chapter: section 315 of this title (which relates to insurance for the protection of the public), section 321 of this title (which relates to designation of an agent for service of process), and those provisions of section 304 of this title which relate to qualifications and maximum hours of service of employees and safety of operation and equipment."

E

Water Carrier Act, section 302, as amended, 54 Stat. 929, 49 U. S. C. §902:

"(i) The term 'interstate or foreign transportation' or 'transportation in interstate or foreign commerce', as used in this chapter, means transportation of persons or property—

(1) wholly by water from a place in a state to a place in any other state, whether or not such transportation takes place wholly in the United States;

(2) partly by water and partly by railroad or motor vehicle, from a place in a state to a place in any other state; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place the United States;

(3) wholly by water, or partly by water and partly by railroad or motor vehicle, from or to a place in

the United States to or from a place outside the United States, but only (A) insofar as such transportation by rail or by motor vehicle takes place within the United States, and (B) in the case of a movement to a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein prior to transshipment at a place within the United States for movement to a place outside thereof, and, in the case of a movement from a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein after transshipment at a place within the United States in a movement from a place outside thereof."

F

Lanham Trade-mark Act, section 45, 60 Stat. 443, 15 U. S. C., §1127:

"In the construction of this chapter, unless the contrary is plainly apparent from the context—

* * * * *

The word 'commerce' means all commerce which may lawfully be regulated by Congress."

G

Chicago Convention on International Civil Aviation of 1944, Article I, 61 Stat. 1180:

"The contracting states recognize that every state has complete and exclusive sovereignty over the airspace above its territory."

## APPENDIX II

Sen. Doc. No. 163, 83rd Cong., 2nd Sess. Aviation Study 69-70 (1955):

"The act as it is presently worded has been interpreted by the National Mediation Board and the courts not to extend to employees of air carriers based outside the continental limits of the United States and its territories. In 1949, the National Mediation Board ruled that title II of the Railway Labor Act does not cover foreign-based employees. The Board's ruling was based on the view that to extend the act to cover employees based abroad would bring this labor legislation into direct conflict with labor laws of foreign countries. In addition, the board held that to attempt application of the Railway Labor Act in a foreign country, rather than the law of the country, would be a challenge to its national sovereignty to govern within its own boundaries. It was noted that the United States would rightly reject any attempt of a foreign government to apply its labor laws in this country. This determination by the National Mediation Board as to the construction of the present language regarding jurisdiction appearing in section 201 of the Railway Labor Act was later upheld by the District of Columbia Court of Appeals in Air Line Dispatchers Association v. National Mediation Board (189 F. 2d 685) (1951).

"In addition, it was pointed out in the testimony that an attempt to give extraterritorial effect to the Railway Labor Act would run counter to a long established doctrine that the labor laws of one country should not be given extraterritorial effect and applied

in a foreign country. In order to adopt the amendment proposed, the committee would give our laws an application contrary to the decision of the court mentioned above but also contrary to a long-recognized policy by this country. This would invite the imposition of foreign labor standards upon employees of foreign industry residing in this country.

"The testimony offered was conflicting. Representatives of the Airline Dispatchers Association, A.F. of L., argued for the application of the Railway Labor Act to employees based abroad, and the spokesmen for the Airlines Personnel Relations Conference and the Air Transport Association opposed such amendment for the reasons stated above. On the testimony offered the committee would not be justified in making such a sharp departure from long-established American policy as is proposed in this bill."

## APPENDIX III

Hearings before the Subcommittee of the Senate Committee on Interstate Commerce on S. 2496, 74th Cong., 1st Sess. (1935).

Pp. 8-9:

"Senator Minton: All that this act could do if amended as you propose to amend it, would be to give you the benefits that are now enjoyed by the rail carriers in trying to bargain collectively with your employer.

Mr. Hamilton: [for the Air Line Pilots Association] That is true."

* * * * *

"Senator Minton: It would put you on a parity with railroad employees?

Mr. Hamilton: Exactly.

Senator Minton: If the Wagner bill should be enacted into law, it might possibly work in conjunction with this act, I take it?

Mr. Hamilton: The Wagner bill would be a great help unquestionably, but this amendment, I believe, would be more effective in accomplishing results than the Wagner bill.

Inasmuch as we are a form of transportation and as transportation affects every other industry, you can see that if you had a stoppage in the air mail, or for that matter in any other form of transportation, it would affect every industry, and I believe that our industry along with the railroads is entitled to a more complete and thorough means of working these things out, and I believe the Railway Labor Act is the thing.

And if all transportation is coordinated in the Interstate Commerce Commission, as undoubtedly it will be, then employees in each form of transportation will have the same status—in other words, will have the same agency to go to, and there will be coordination."

P. 12:

"Senator Black: [referring to substitutes proposed by the National Mediation Board, ultimately enacted as Sections 203 and 204, that the services of the Mediation Board 'may be invoked * * * in the same manner and to the same extent as are the disputes covered by Section 5 of Title I of this Act']. As to substituting for sections 203 and 204 what you suggest, might I ask if those substitutes are drawn in such a way as to give exactly the same range to the men engaged in air transport as would be invoked by men engaged in railroad employment?

Mr. Cook: [Secretary of National Mediation Board]. I understand so.

Senator Black: The object is not to impair the effectiveness of the bill but simply to make it apply with uniformity to both classes of employees, as I understand.

Mr. Cook: That is correct."

P. 16:

"Senator Black: What you want is to be able to invoke a remedy under the same conditions as railway employees may now do, is that it?

Mr. Haddock: [President, American Radio Telegraphists Association]. That is correct. And if it would mean that it would be perfectly all right to us."

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JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 429

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, *Petitioner,*

v.

NORTHWEST AIRLINES, INC., *Respondent*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

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No. 429

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AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, *Petitioner*,

v.

NORTHWEST AIRLINES, INC., *Respondent*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. In arguing that this case does not present the broad problem of what law governs employment relations on American flag airplanes when flying outside the physical boundaries of the United States, the Brief in Opposition (p. 5) states that the case actually involves only the legality of a contract. This is not correct. This is a specialized proceeding under the

Railway Labor Act in which the courts are empowered to set aside the award of an arbitration board which does not conform to the substantive requirements of that Act. The district court found that the award here made was illegal if the Act was applicable (R. 196-197). The Court of Appeals accepted this finding. Since there has been no cross-petition filed here, this finding must be accepted as final. Thus the issue of the law applicable is squarely before this Court.

2. The repeated statements in the Brief in Opposition (pp. 6, 8, 9) that Congress in its enactment of the Federal Aviation Act of 1958 (72 Stat. 737, 49 U.S.C. 1301, *et seq.*) rejected the interpretation of the Railway Labor Act here advanced by petitioner, are contrary to the fact. In the House Report (H. Rept. 2360, 85th Cong., 2d Sess., pp. 10-11), in the debate on the floor of Congress (104 Cong. Rec. 16086), and in the Conference Report (H. Rept. 2556, 85th Cong., 2d Sess., p. 90), Congress expressed unequivocally that its reenactment without change of provisions of the Civil Aeronautics Act of 1938 was not to be used by courts as indicating any Congressional intent as to the meaning thereof. Thus, the Conference Report states (p. 90):

> "*Effect of reenactment of provisions of present law.* The committee of conference wishes to make it clear that it endorses, as expressing the intention of the managers on the part of the Senate and the managers on the part of the House, the statements in the House debate, and the House committee report to the effect that Congress does not intend that this reenactment of the Civil Aeronautics Act of 1938 shall constitute legislative adoption of administrative interpretations and practices or of judicial decisions under that act.

> It is important that there be no doubts on this point, particularly in view of the many legal controversies over the interpretation of the provisions of title IV. * * *
>
> "As stated in the report of the House Committee on this legislation, therefore, the reenactment of provisions now in effect is to be regarded as a completely neutral factor in any question arising hereafter as to the interpretation of the present law or of this new legislation."

Title IV of the Civil Aeronautics Act of 1938, to which the above quotation specifically refers, contained in Section 401 (*l*) (4) the requirement of compliance with the Air Carrier Amendment to the Railway Labor Act as a condition of every certificate of public convenience and necessity, and in this respect was reenacted without change in the Federal Aviation Act of 1958 (Section 401 (k) (4), 49 U.S.C.A. Supp. 1371 (k)(4)).

Nor are the proceedings in the 83rd Congress relied upon in the Brief in Opposition (pp. 8-9, 27-28) any part of the legislative history of the Federal Aviation Act of 1958. While the Senate Report (S. Rept. 1811, 85th Cong., 2d Sess., p. 7) and the House Report (H. Rept. 2360, 85th Cong., 2d Sess., pp. 2-3) on the bill which became the Federal Aviation Act of 1958, list certain bills and hearings in earlier Congresses as part of the consideration by Congress of the problem posed by the mid-air collisions in 1958, which necessitated the hurried adoption of a unified aviation system which included control of military as well as civil flights, none of the bills, reports and studies cited in the Brief in Opposition (pp. 8, 27-28) are mentioned in these reports.

S. 2647, 83rd Cong., 2d Sess., which is the bill cited in the Brief in Opposition (p. 8), contained only one provision to amend the Railway Labor Act, namely, Section 1201 (b) (1), which read as follows:

> "(1) Section 201 of the Railway Labor Act (U.S.C. 1940 edition, title 45, sec. 181), by amending such section to read as follows:
>
> "Section 201. All the provisions of Title I of this Act, except the provisions of Section 3 thereof, are extended to, and shall cover, every air carrier and air contractor, as those terms are defined in the Civil Aeronautics Act of 1944, and every person (including, but not by way of limitation, corporations, joint-stock associations, partnerships and unincorporated associations) which is directly or indirectly owned or controlled by one or more such carriers or contractors, including any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of such carrier, air contractor, or other person, and every person who performs any work as an employee or subordinate official of such carrier, such contractor, or such other person, and is subject to its continuing authority to supervise and direct the manner of rendition of his service, whether or not such work is in connection with air transportation or air commerce. The definition of the term 'employee' set forth in Section 1 of this Act shall not be applicable to this title."

The foregoing is the only language in S. 2647, 83rd Cong., 2d Sess., relating in any way to the issues here involved. That a committee of one of the branches of Congress did not approve this provision seems of no relevance.

Nor is there any thing in the quoted Aviation Study made in the 83rd Congress (Br. in Opp. pp. 27-28) directed to personnel working on American flag planes, as to whom American law would seem obviously applicable without any issue of extraterritoriality arising. Furthermore what certain Congressmen in 1955 think a law enacted in 1938 means cannot be considered its "legislative history." *New York* v. *Saper*, 336 U.S. 328, 339-340; *Guessefeldt* v. *McGrath*, 342 U.S. 308, 317; *Wong Youg Sung* v. *McGrath*, 339 U.S. 33, 47.

3. The case of *Air Line Dispatchers Ass'n* v. *National Mediation Board*, D. C. Cir. 1951, 189 F. 2d 685, certiorari denied, 342 U.S. 849, upon which the Brief in Opposition (pp. 5, 7, 8) relies so heavily, is not an applicable precedent here because of the total dissimilarity of facts. There the Air Line Dispatchers Association had applied to the National Mediation Board for certification as the representative of flight dispatchers of a company which conducted no operations in the United States. The flight dispatchers performed their work entirely upon foreign soil, were not members of the crew of any airplane and did not perform any of their work upon or within any airplane. In these circumstances the National Mediation Board considered the Railway Labor Act inapplicable and dismissed the petition. The United States Court of Appeals for the District of Columbia Circuit upheld the National Mediation Board's dismissal as proper, saying (at pp. 687, 690):

> "The Company operates and the dispatchers are employed solely outside the continental limits of the United States.
>
> * * *

> "Turning to the merits of the decision made by the Board, we agree that the Act does not extend to an air carrier, and its employees located entirely outside the continental United States and its territories."

It is true that the opinion of the Court of Appeals in the *Air Line Dispatchers* case does reach the conclusion that the Railway Labor Act is limited in its application to the physical boundaries of the United States. The court, however, did not have before it and did not consider the application of the Act to crews performing all their services on board American flag airplanes. We believe the opinion in the *Air Line Dispatchers* case must be strictly limited to the facts of that case.

Except for the *Air Line Dispatchers* case we know of no instance in which the National Mediation Board has ever applied the doctrine enunciated by the courts below, that the Railway Labor Act has no application beyond the physical boundaries of the United States. The National Mediation Board has uniformly refused to apply rail coverage standards to airlines. *Matter of Representation of Northwest Airlines, Inc.—Mechanical Department Foremen*, 1948, 2 N.M.B. 19, 24-26.

An examination of the references cited by the Brief in Opposition (pp. 6-7) to show that it has not been the uniform practice to apply the Railway Labor Act to all pilots and engineers on American flag airplanes even when they are based or fly wholly outside the United States, establishes just the opposite. Various instances in which the National Mediation Board has applied the Railway Labor Act to disputes outside the physical boundaries of the United States are set forth in National Mediation Board, 16th Annual Re-

port, p. 53; 17th Annual Report pp. 14-15; 18th Annual Report, p. 44; 19th Annual Report pp. 43-44.

4. Contrary to the statement in the Brief in Opposition (p. 12), the Civil Aeronautics Act both by its terms, by regulations issued thereunder and by the uniform decisions construing it, is applicable to all flights by American flag airplanes no matter where in the world they take place. No American flag airplane may engage in commercial transportation anywhere in the world except under a certificate of public convenience and necessity issued by the Civil Aeronautics Board. Section 401 (a) and (e), 49 U.S.C.A. Supp. 1371 (a) and (e). Such certificates uniformly contain a provision, such as is present in the instant case (R. 115, 119), that the carrier shall not render service to any point abroad not included in a service plan approved by the Board. 14 C.F.R. 203.2 American citizens, even when they acquire title to a plane abroad, must register it. Section 501 (a) and (b), 49 U.S.C. 1401 (a) and (b). See *Miller v. United States*, Ct. Cl., 1956 140 F. Supp. 789, 791. C.A.B. safety regulations specifically apply to air transportation operations "between any two places outside the United States." 14 C.F.R. 41.0.

Neither *Lineas Aereas Costarricenses, S. A.*, 18 C.A.B. 552, 557-558 (1954) nor *Latin American Air Freight Case*, 16 C.A.B. 107, 160 (1952), stands for the proposition for which they are cited in the Brief in Opposition (p. 12). Lineas Aereas Costarricenses is a Costa Rican corporation (18 C.A.B. at p. 558, n. 9) The C.A.B. held that this foreign corporation was not required by our law to secure a permit from the United States to operate between points outside the United States, where it was not seeking any traffic rights be-

tween the United States and those points. Foreign corporations are not permitted to register their planes as American flag planes but rather must look to their home country for all rights not involving traffic within the United States.

In the *Latin American Air Freight Case*, 1952, 16 C.A.B. 107, the C.A.B. did not adopt the language of the Examiner to which the Brief in Opposition (p. 12) refers but expressly refused to grant a certificate to Aerovias Sud Americana (an American corporation —see 16 C.A.B. at p. 115) to move freight between Tegucigalpa, Honduras and Havana, Cuba on the ground that the public convenience and necessity would not be served thereby (16 C.A.B. at 115, 123).

The Brief in Opposition proceeds on the assumption that after a plane stops for fuel or to pick up or discharge passengers at a point outside the United States, its subsequent flight to other points outside the United States ceases to be commerce between the United States and a foreign country. The record here shows that all Northwest Airlines flights abroad are certificated as segments of flights to and from the United States (R. 114, 118). Northwest Airlines carries predominantly United States mail and United States citizens traveling to and from the United States on all of its flights (R. 51, 66, 67, 68-112). And under the Bermuda Agreement of 1946 and other bilateral treaties the United States has subscribed to the principle that international aviation should be devoted to building up of air carriage between the country of the nationality of the airplane and foreign points but not to building up of traffic between points outside the country of the nationality of the

airplane except to the extent of "fill-in" capacity. In other words, the United States has agreed that it will not permit American flag airplanes to build up air traffic between any two points outside the United States except to fill in unused seats or unused space arising as part of traffic to and from the United States. S. Rep. 1875, 84th Cong., 2d Sess., International Air Agreements, Report of Committee on Interstate and Foreign Commerce, United States Senate, pp. 7-10, 25; H. A. Wassenbergh, Post-War International Civil Aviation Policy and the Law of the Air, The Hague, Martinus Nijhoff, 1957, pp. 42-44, 53-61.

5. In arguing that the law of the flag does not apply to airplanes, the Brief in Opposition (pp. 15-16) ignores the fact that our Congress certainly assumed it did when it amended the Criminal Code to include within the term "special maritime and territorial jurisdiction of the United States", "any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State." 66 Stat. 589, 18 U.S.C. 7, as amended July 12, 1952. Here all the flights of Northwest Airlines outside the United States are entirely over the high seas except when stopping at the islands of the Pacific or at Hong Kong or Seoul to take on fuel or discharge or pick up passengers or cargo.

We do not read *Regina* v. *Martin*, (1956) 2 All Eng. L. R. 86, relied upon Brief in Opposition (p. 15), as

rejecting the law of the flag. While the court found it unnecessary to pass on the point, the court's references to English statutes and its reasoning indicate acceptance of that principle in Great Britain.

6. Since the petition for a writ of certiorari was filed herein the need for a decision by this Court of the questions here presented has increased. While we did not call to this Court's attention pending litigation on this issue in the United States Court of Appeals for the Second Circuit because negotiations were then in process which we believed would make that case moot, the negotiations proved unsuccessful and indeed a strike has now been voted with one of the issues in dispute the failure of the airline to recognize and deal with the Air Line Stewards and Stewardesses Association as the representative of some fifty foreign nationals who have chosen the Association as their representative and beseeched it to adjust grievances on their behalf. This is the case of *Air Line Stewards and Stewardesses Association* v. *Trans World Airlines*, D. C. S. D. N. Y., 173 F. Supp. 369, on appeal to the United States Court of Appeals for the Second Circuit and set for argument on November 12, 1959.

Likewise, subsequent to the filing of the petition for a writ of certiorari herein, the Braniff Airways, Inc., has refused to bargain collectively with the Air Line Stewards and Stewardesses Association as the representative of thirty-four pursers and hostesses based outside the United States but each of whom flies into the United States and performs services on American flag airplanes while flying within the physical boundaries of the United States and while landed on United States soil. The union has filed suit to compel bargaining. *Air Line Stewards and Stewardesses Association*

v. *Braniff Airways, Inc.*, Civil No. 59C1662, United States District Court for the Northern District of Illinois, Eastern Division. In each the *TWA* case and the *Braniff* case the sole issue is the applicability of the Railway Labor Act to crews on airplanes flying in whole or in part beyond the physical boundaries of the United States.

Respectfully submitted,

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